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No. 81-2162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

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PIONEER FINISHING CORPORATION,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
AND KENNETH PACHECO, et al.,

RESPONDENTS.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The First Circuit

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of

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*Pursuant to Rule 36.2 of the Rules of this Court, written consents of the

large and small employers formed to monitor the activities of the National Labor Relations Board and other developments relating to the NLRA and to give support in those cases or on those issues which affect a broad section of industry. COLLE was formed in recognition of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy.

Pioneer Finishing Corporation's Petition for Writ of Certiorari raises the important question of when the National Labor Relations Board should defer to an arbitrator's award in a matter which has given rise to both a contractual grievance and an unfair labor practice charge. Pioneer discharged an employee for distributing without permission a misleading leaflet derogating the Company's safety record.

An arbitrator upheld the discharge and ruled that the grievant's unauthorized distribution of the false leaflet and his attempts to alter the collective bargain were not "protected activity." The Board refused to defer to the arbitrator's award and found the employer in violation of the Act, and the First Circuit enforced the Board's order.

The issues of when an award is repugnant to the Act and whether an arbitrator must actually address the statutory issue (rather than simply dispose of the core statutory issue in finding facts and resolving the contractual dispute) are extremely important to employers. The decision below represents a serious threat to the efficacy of the arbitration process, a process which plays a major role in national labor policy. Routinely affording unions "another bite of the apple" if they are disappointed with the results of bargained-for arbitration will seriously undermine the benefits to employees of agreeing to a grievance arbitration procedure in the first

place.

SUMMARY OF THE ARGUMENT

For almost three decades, the Board has had a policy of deferring to an arbitration award if (1) the proceedings were fair and regular; (2) the parties had agreed to be bound; and (3) the arbitration award was not clearly repugnant to the policies of the Act. Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955). In Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), the Board also revived a requirement that the unfair labor practice issue must have been presented to and considered by the arbitrator.

In the case at bar, the Board refused to defer to the arbitrator's award and went on to find that Pioneer had violated Sections 8(a)(1) and (3) of the Act. The United States Court of Appeals for the First Circuit enforced the Board's order, upholding the Board's refusal to defer on the grounds that the arbitrator had not adequately addressed the statutory issue and that the arbitrator's decision was repugnant to the purpose and policies of the Act.

On the issue of when an arbitrator's award is "clearly repugnant" the decision of the First Circuit below conflicts with the Third Circuit's decision in NLRB v. Pincus Brothers, Inc., 620 F.2d 367 (3rd Cir. 1980) and with the Ninth Circuit's decision in Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979).[1] On the issue of whether the arbitrator must specifically address the unfair labor practice issue, the Court below is in conflict with the Second Circuit[2] and

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[1]And, indeed, it is inconsistent with the recent position of the Board in G&H Products, Inc., 261 N.LR.B. No. 47, 110 L.R.R.M. 1036 (1982)

[2]Liquor Salesmen's Union, Local No. 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981) cert. denied sub nom. Liquor Salesmen's Union v. Charmer Industries, Inc., 50 U.S.L.W. 3916 (U.S. May 17, 1982) (No. 81-1544).

the Fourth Circuit.[3] Furthermore, the refusal of the Court below to defer to an arbitrator unless he has specifically addressed the potential statutory issue is contrary to national labor policy as articulated in the decisions of this Court. This split in authority and the importance of assuring that the arbitration process will continue to serve national labor policy commend this case to the attention of this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS OVER WHEN THE BOARD OUGHT TO DEFER TO AN ARBITRATOR'S AWARD

In Spielberg Manufacturing Company, 112 N.L.R.B. 1080 (1955), the National Labor Relations Board enunciated a policy of deferring to an arbitrator's award

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[3] NRLB v. Motor Convoy, Inc., __ F.2d __, 109 L.L.R.M. 3201 (4th Cir. 1982).

where: (1) the proceedings were fair and regular; (2) the parties had agreed to be bound by the arbitrator's decision; and (3) the arbitrator's award is not "clearly repugnant to the purposes and policies of the Act." Id. at 1082. The Board adopted this deferral policy out of its belief that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award." Id.

A fourth deferral criterion has developed over the years and has been variously formulated. In Raytheon Co., 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964), the Board declined to defer where the arbitrator had been precluded from considering the unfair labor practice issue underlying the contractual discharge grievance. In Suburban Motor Freight, 247 N.L.R.B. 146 (1980), the Board announced that it would not abide by an arbitrator's award unless the unfair labor practice issue had been both presented to and considered by the

arbitrator.[4] However, in the subsequent refusal to bargain case of Bay Shipbuilding Corp., 251 N.L.R.B. 809 (1980), the Board deferred to the arbitrator's award despite the arbitrator's silence on the U.L.P. issue. The award met the three Spielberg criteria, and all the Board required of the arbitrator was that he had made factual findings which also resolved the U.L.P. question. Id. at 810.[5]

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[4] Member Penello vigorously dissented, arguing that unless unusual circumstances had prevented the grievant from raising the discrimination issue during arbitration, the Board should accept the arbitrator's award and avoid "multiple litigation of the same set of facts." 247 N.L.R.B. at 147.

[5] In his concurring opinion, Member Truesdale defined the critical question for deferral purposes as "whether there

The Fourth Circuit has recently phrased this fourth criterion as a requirement that "the unfair labor practice charges were resolved." NLRB v. Motor Convoy, Inc., ___ F.2d ___, 109 L.R.R.M. 3201, 3202 (4th Cir. 1982).

In the case at bar, the ALJ felt that the arbitrator had confined himself to the contractual question. Since the arbitrator's award "was not consistent with the determination the Board would make," 247 N.L.R.B. at 1307, the ALJ concluded that the award failed to meet the third Spielberg standard (that an award not be "clearly repugnant" to the Act). The Board panel affirmed the ALJ without discussion of this issue. The First Circuit read the ALJ's decision as

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is a parallelism between the contractual and statutory issues, such that, by resolving the contractual issue, the arbitrator implicitly resolved the unfair labor practice." Id. at 811.

refusing to defer because the arbitrator had not considered the statutory issues and because the result he had reached was not consistent with the Act. The Court below accepted the Board's refusal to defer, on the ground that the arbitrator "did not adequately address the statutory issue." [A-5][6] The Court also observed that implicit in its finding that the grievant had engaged in protected activity is a judgment that the result reached by the arbitrator was contrary to the purpose and policies of the Act. [A-7]

This decision of the First Circuit conflicts with decisions of several other Courts of Appeals regarding the necessity that the arbitrator have addressed the ULP issues and also regarding the proper standard for rejecting an award as

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[6]Such references indicate pages in the Appendix to Pioneer's Petition for Writ of Certiorani.

"repugnant to the Act".

A. The Circuits Are Divided Over Whether The Board Ought To Defer To Any Award Which Resolves The Underlying Unfair Labor Practice Issue Without Discussing It As A Statutory Issue

Arbitrator Robert A. Browning upheld Pioneer's discharge of Mr. Pacheco, ruling that his preparation and unauthorized circulation of a deliberately misleading leaflet was beyond the scope of "protected activity." [A-110 to -111] Nevertheless the Court below rejected the arbitrator's award "because the arbitrator did not adequately address the statutory issue." [A-5]

The belief of the Court below that in order for an arbitator's award to be worthy of deference the arbitrator must have addressed the statutory issue is in conflict with the position taken by the Second Circuit in Liquor Salesmen's

Union, Local 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981), cert. denied sub nom. Liquor Salesmen's Union v. Charmer Industries, Inc., 50 U.S.L.W. 3916 (U.S. May 17, 1982) (No. 81-1544). In that case, the union claimed both in a contractual grievance and in a U.L.P. charge that the employer unilaterally changed collection procedures for salesmen. The company won at arbitration, but the Board refused to honor that determination because the arbitrator had not specifically disposed of the U.L.P. allegation [§8(1)(5) refusal to bargain]. The Board found a violation, but the Second Circuit refused to enforce the Board's order. The circuit court held that in deciding the contractual grievance, the arbitrator had "in substance" decided the statutory issue as well. Therefore, said the court, the Board should have deferred to the arbitrator's decision.

The Second Circuit recognized that the arbitrator in Liquor Salesmen's

had reached his decision on the basis of contract interpretation and past practice but the court also realized that his determination "was necessarily dispositive of the statutory issue." 664 F.2d at 325. In language equally applicable to the case at bar, the court concluded:

> Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a fact-finder strengthen the case for deference to his findings. . . . Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement.

Id. (citation omitted)

The Fourth Circuit has also held that it was unnecessary for an arbitrator to specifically address the U.L.P.

issue, where resolution of the contract issue discussed by the arbitrator necessarily resolved the U.LP. issue. NLRB v. Motor Convoy, Inc., ___F.2d ___, 109 L.R.R.M. 3201 (4th Cir. 1982). Motor Convoy involved an arbitrator's decision that the employer had had "just cause" to discharge the grievant. Besides the usual "just cause" requirement, the labor agreement also contained a prohibition of discrimination based upon an employee's union activities. The Fourth Circuit concluded that "inherent in [the arbitrator's finding of just cause] was a resolution of the question of whether [the grievant] was fired for an illegal or illicit cause, such as protected union activities." Id. at 3203.

Since such guarantees against discrimination for union activities are quite common in modern labor agreements,[7] a vast number of

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[7]Of a sample of 400 contracts. 49% contained guarantees against discrimination for union activities or

collective bargaining agreements will generate grievance arbitration awards which will be entitled to deference under the Fourth Circuit's view but which will not be accorded deference by the First Circuit unless the arbitrator happens to address himself to the statutory issue which mirrors the contractual one.

B. The Circuit Courts Are Divided Over When The Board Can Reject An Arbitrator's Award as "Repugnant To The Act"

The third deferral criterion enunciated by the Board in Spielberg is that the arbitrator's decision be "not clearly repugnant to the purposes and policies of the act." 112 N.L.R.B. at 1082. In the case at bar, the ALJ ruled that the arbitrator's award was repugnant to the Act "[s]ince I conclude that the

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membership. 2 Collective Bargaining Negotiations & Contracts [BNA] 95:5 (1979).

disposition made by the arbitrator was not consistent with the determination the Board would make." [A-55] The court below agreed that the arbitrator's result was contrary to the purpose and policies of the Act. [A-7][8] This easy equation of any decision the Board might make differently in a trial de novo with a decision that is "clearly repugnant to the purposes and policies of the Act" is contrary to decisions of several other Circuit Courts (and contrary to other decisions by the Board itself).

The decision below is in direct conflict with the decision of the Third Circuit in NLRB v. Pincus Brothrs, Inc.-Maxwell, 620 F.2d 367 (3rd Cir. 1980). The facts of Pincus Brothers are strikingly similar to the case

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[8]However, the court based its decision primarily on its conclusion that the arbitrator had failed to adequately address the statutory issue underlying the grievance. [A-5]

at bar. The employer discharged an employee for distributing during working and nonworking time a leaflet which intentionally misrepresented the facts regarding the Company's employment practices and products. The employee grieved her disharge, and an arbitrator ruled she had been discharged for "cause" and that her conduct had been unprotected. The Board refused to defer to the arbitrator's decision and went on to find that the firing had been an unfair labor practice.

The Third Circuit denied enforcement, holding that it was an abuse of discretion for the Board to refuse to defer to any award which is arguably not inconsistent with Board policy. Id. at 374. The Third Circuit concluded that where an arbitral result is only arguably correct (and might be decided differently in a trial de novo), the national policy in favor of labor arbitration outweighs the need for uniformity of results or for correct resolution of every individual dispute. Id. at 374. As the court explained:

> Deference by the Board to the arbitration process, especially when the award has already been rendered and it is arguably consistent with Board policy, will effectuate the intent of the parties in the collective bargaining agreement and avoid the time, expense and inconvenience of duplicative proceedings. The parties accepted the risk that arbitration results could differ from Board decisions when they elected to proceed by arbitration and the Board recognized the possibilities when it adopted the policy to defer to an arbitrator's award.

Id. at 374-75.

In Douglas Aircraft Company v. NLRB, 609 F.2d 352 (9th Cir. 1979), a case relied on by the Pincus Brothers court, the Ninth Circuit ruled that it was an abuse of discretion for the Board to refuse to defer where one of two readings of an arbitrator's award would not be repugnant to the Act. Spielberg calls for acceptance of an award which is

"not clearly repugnant." The Court pointed out a basic semantic fact overlooked by the ALJ and the court below in the instant case:

> If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act. Nor can it be said that such an award was "palpably wrong."

Id. at 354.

In rejecting the arbitrator's decision in the case at bar because the Board would have decided the dispute differently de novo, the Board and the court below have thrown the basic Spielberg doctrine out the window.[9]

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[9]Indicative of the retreat from Spielberg is a study of Board deferral decisions from 1977-80 which concluded: "When faced with the choice of either

In Spielberg itself, the Board decided to defer to the arbitrator despite the Trial Examiner's finding that there had been an unfair labor practice. The contrary arbitrator's award was not "clearly repugnant": "[T]he arbitration award is not . . . at odds with the statute. This does not mean that the Board would necessarily decide the issue . . . as the arbitration panel did." 112 N.L.R.B. at 1082.

The Board itself quite recently has returned to the spirit of Spielberg, in a decision which contradicts the position which was taken by the ALJ in the case at bar and endorsed by the Court below. In

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deferring to an arbitrator's decision or reviewing the case on its merits, then, the NLRB ignored the arbitrator's award about eighty-two percent of the time." Comment, Judicial Review and the Trend Toward More Stringent NLRB Standards on Arbitral Deferrals, 129 U. Pa. L.Rev. 738, 753 (1981).

the instant case, the ALJ and court took "not clearly repugnant" to mean, in effect, "is consistent with the decision the Board would make." But in the recent case of G & H Products, Inc., 261 N.L.R.B. No. 47, 110 L.R.R.M. 1036 (1982), the Board explained that "[i]n determining if an arbitrator's award is clearly repugnant under Spielberg, the test to be applied is not whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law." Id. at 1036, citing International Harvester Co. (Indianapolis Works), 138 N.L.R.B. 923, 926 (1962). The practical effect of following a result-oriented deferral policy was previously recognized and rejected by the Board in Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet, 228 N.L.R.B. 828 (1977). In that case, an ALJ had refused to defer to the arbitration process[10] on the ground;

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[10] Under Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

inter alia, that an arbitration proceeding on the merits of the dispute "might very well result in a dismissal of the grievance, while a contrary result would result under the Act." Id. at 838. The Board instead chose to defer to aritration and observed that "if the Administrative Law Judge's reasoning were accepted, deferral to arbitration would be an exercise in futility." Id. at 829.

II. THE FIRST CIRCUIT'S REQUIREMENT THAT THE ARBITRATOR HAVE SPECIFICALLY ADDRESSED THE UNFAIR LABOR PRACTICE ISSUE IS CONTRARY TO THE ROLE ASSIGNED TO ARBITRATION BY DECISIONS OF THIS COURT

In the case at bar, the ALJ's decision that the arbitrator's award was not entitled to deference was based in part on his conclusion that "the arbitrator's decision rests upon principles of arbitral jurisprudence and articles of the bargaining agreement." [A-54] Criticising an arbitrator for fidelity to the contract from which he draws his charter manifests a basic

misunderstanding of the everyday functioning of industrial arbitration and a departure from this Court's decisions recognizing the essential role of arbitration in today's industrial society.

This Court has long recognized that federal policy is to promote industrial stabilization through collective bargaining and that a "major factor in achieving industrial peace" has been the inclusion of arbitration provisions in collective bargaining agreements. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Arbitrators under such collective agreements "are indispensable agencies in a continuous collective bargaining process." United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 596 (1960). However, this Court has also defined the limits within which the arbitrator must confine himself if his decision is to be ultimately enforceable in federal courts:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation courts have no choice but to refuse enforcement of the award.

Id. at 597. (emphasis added)

Most labor agreements contain arbitration provisions.[11] A great many contracts explicitly prohibit the arbitrator from adding to, subtracting

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[11]The Bureau of Labor Statistics has estimated that almost 97% of major collective bargaining agreements contain grievance arbitration clauses. U.S. Bureau of Labor Statistics, Characteristics of Major Collective

from or modifying the provisions of the contract. The ALJ rejected the arbitrator's decision in the case at bar because "it rests upon principles of arbitral jurisprudence and articles of the bargaining agreement." [A-54] The First Circuit reached the same conclusion, finding that the arbitrator had not adequately addressed the statutory issue. [A-5] Yet this Court has indicated that an arbitration award "based solely upon the arbitrator's view of the requirements of enacted legislation" would exceed the scope of an arbitrator's authority and would not be enforceable. Enterprise Wheel & Car, 363 U.S. at 597. Under the standard employed below in the case at bar, few arbitration decisions sustaining the employer's position would prevent the losing union from relitigating the same facts before the Board. And to dilute the principle

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Bargaining Agreements, Bulletin 2095 (Washington, D.C.: U.S. Government Printing Office, January 1980)

of arbitral finality is destructive of the entire arbitration process as a cornerstone of industrial relations peace.

As one commentator has observe, "the parties have an institutional stake in finality because the arbitrator is their creation; he functions by their consent and at their sufferance, and his powers and roles can and should be molded by them to suit their own purposes." Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Colum.L.Rev. 267, 275 (1980). Another observer has noted the factors leading to the success of arbitration:

> Parties may devise and control the procedure, including the selection and authority of the arbitrator. The process provides an impartial, final, binding decision to disputes. Arbitration awards are attuned to "the law of the shop," rather than to legal points. The process is generally quicker, cheaper, and

> more informal than resolution in the courts. Arbitration as a final step encourages parties to resolve grievances before they reach abitration.

Loewenberg, An Arbitration Timebomb?, 37 Arb. J. 50, 50 (1982).

The Board based its Spielberg deferral policy on its belief that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award." 112 N.L.R.B. at 1082. As Member Penello stated in his dissent in Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), Spielberg commits the Board to a purpose of encouraging peaceful settlement of industrial disputes. He cautioned that "[s]uch a purpose can be fatally frustrated by permitting voluntary arbitration agreements to be avoided through multiple litigation of the same set of facts." Id. at 147.

The District of Columbia Circuit has sounded the same theme, stressing that it is important that disputants continue to

be attracted to arbitration for resolution of differences that are susceptible to arbitration. District 1199E, National Union of Hospital & Health Care Employees v. NLRB, 613 F.2d 1102, 1109 (D.C.Cir. 1979). The court indicated that "failure by the Board to give appropriate consideration to an arbitrator's construction of a collective bargaining agreement could 'thwart the strong policy favoring private dispute-solving mechanisms.'" Id., quoting Retail Clerks Local 588 v. NLRB, 565 F.2d 769, 777 n.20 (D.C.Cir. 1977). The same court has also recognized that if the disputants feel that the Board will give de novo consideration to arbitrable issues, the arbitration of controversies involving potential unfair labor practices will be greatly discouraged. Bloom v. NLRB, 603 F.2d 1015, 1019 (D.C. Cir. 1979).

Former NLRB General Counsel John S. Irving, Jr. has urged that voluntary arbitration should be actively encouraged, rather than discouraged. He also explained the ripple effect of a

tightened deferral policy:

> The Spielberg area is extremely important and should not be thrown into doubt by the Board. The fine-tooth-comb approach to reviewing arbitration decisions will do little to encourage private resolution of disputes. Similarly, if the Board raises questions concerning the vitality of Spielberg, the General Counsel, consistent with his perceived responsibility to put issues to the Board, will defer to awards less often and will issue more complaints. More cases will be thrown unnecessarily into the board's machinery and disputants will be encouraged to use government processes, rather than agreed-upon private machinery.

Irving, Arbitration and the National Labor Relations Board, 35 Arb. J. 5 (1980). The consequences for industrial relations of such a disincentive to arbitration are grave. As the Fourth

Circuit warned, an employee whose discharge grievance was being arbitrated would be motivated to save his discrimination argument for "appeal" to the NLRB in case the arbitrator rules against him, and "[a]rbitration would become nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it is designed to be." NLRB v. Motor Convoy, Inc., ___ F.2d ___, 109 L.R.R.M. 3201 (4th Cir. 1982). Naturally, if employers begin to perceive arbitration as a mere preliminary to the "main event" before the Board -- rather than as a consensual procedure to arrive at final, binding resolutions of disputes -- they will be tempted to refuse to arbitrate cases with U.L.P. potential, since they can't "win". If that ever comes to pass, as Member Penello has warned:

> Individuals aggrieved by suspected discrimination in their discipline will then have no alternative but to take their place in line with the

> burgeoning masses of charging parties before the Board with claims of discrimination in discipline or discharge. These individuals will wait, and wait and wait for the protection of rights promised them.

Surburban Motor Freight, Inc., 247 N.L.R.B. 146, 148 (1980) (Member Pennello, dissenting).[12]

The necessity that the Board give "hospitable acceptance"[13] to the arbitration process in order to effectuate national labor policy, the harm to the arbitration process occasioned by "overzealous dissection of

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[12] See also 6 J.Corp.L. 399, 411 (1981).

[13] International Harvester Co. (Indianapolis Works), 138 N.L.R.B. 923, 927 (1962).

opinions by the NLRB"[14] and the failure of the court below to appreciate the proper role of the arbitrator delineated in this Court's decisions all recommended this case for consideration by this Court at this time.

CONCLUSION

For the foregoing reasons, we ask that the writ be granted.

Respectfully submitted,

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June, 1982

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[14] Douglas Aircraft Co., 609 F.2d 352, 355 (9th Cir. 1979).